

FCC MAIL SECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93M-221
31430

MAY 4 3 00 PM '93

In re Applications of

~~DISPATCH~~ HUBER

ADAMS RIB, INC.

RITA REYNA BRENT

D.E.K.W. COMMUNICATIONS, INC.

MIDAMERICA ELECTRONICS SERVICE, INC.

STATON COMMUNICATIONS, INC.

For Construction Permit for a
New FM Station on Channel 234A
in New Albany, Indiana

) MM DOCKET NO. 93-51

) File No. BPH-911114ME

) File No. BPH-911115MA

) File No. BPH-911115MC

) File No. BPH-911115MF

) File No. BPH-911115ML

) File No. BPH-911115MU

MEMORANDUM OPINION AND ORDER

Issued: May 3, 1993;

Released: May 4, 1993

Background

1. This is a ruling on a Motion To Dismiss that was filed on April 16, 1993, by Martha J. Huber ("Huber"). Huber seeks dismissal for failure to prosecute the applications of Adams Rib, Inc. ("Adams Rib") and D.E.K.W. Communications, Inc. ("DEKW"). An Opposition was filed on April 19, 1993, by Adams Rib.¹ No Opposition was filed by DEKW and that applicant is found to be in default.² Huber filed her Reply on April 23, 1993. An additional Reply pleading was filed by Staton Communications, Inc. ("Staton") on April 28, 1993.

Facts

2. On March 22, 1993, seven days after the release of the designation order, counsel of record for Adams Rib withdrew from the case. Since then Adams Rib has proceeded pro se without benefit of counsel. It is factually

¹ It is not clear that the Opposition was filed with the Secretary's office as the rules require. See 47 C.F.R. §1.4(c) (all pleadings must be filed in complete form in the office of the Commission Secretary). It is essential to the efficient litigation of this case that the rules with respect to filing be strictly adhered to by all parties. See also 47 C.F.R. §1.51(a) (an original and six copies of pleadings shall be filed at the office of the Commission Secretary).

² DEKW has failed to file a Notice Of Appearance, has failed to exchange a Standard Integration Statement, and has failed to make the initial standard document production.

correct as alleged by Huber that the date for the filing and service of a Notice Of Appearance ("NOA") was April 5, 1993, which was a Monday. Huber admits that Adams Rib filed its NOA on April 6, 1993, one day late.

3. Adams Rib contends through its president, Ms. Mary L. Smith, that the NOA was in fact filed in the Secretary's office on April 2, 1993, a Friday. She states in the Opposition:

An original and four copies of our "statement of appearance" was filed with the Secretary of the Federal Communications Commission on April 2, 1993. I spoke with Mr. Bill Caton of the Secretaries (sic) office on this date (sic) and he advised that it had been logged in and that two copies were sent to Judge Sippel's office. I also sent a copy to each of the applicant's attorney of record. (Emphasis in original).

This account conflicts with the stamps on the document which reflect that the NOA was received in the Commission mail room on April 6 but was not received in the Secretary's office until April 13, 1993.

4. The Adams Rib Standard Integration Statement ("SIS") apparently was mailed on April 13, 1993, according to the postage on the envelope that was sent to Huber's counsel. See Reply at Att.3. It is noted that the date of April 13, 1993, also appears on the envelope that was used to transmit the SIS to Staton and that date also appears on the envelope used to transmit the SIS to the Presiding Judge. Counsel for Huber has determined that as of April 23, 1993, there is no record of the SIS being filed with the Secretary's office. It is noted that the only "copy" which was sent by Mrs. Smith to the Presiding Judge appears to be an original. There is no docket number on the SIS. The SIS is dated April 9, 1993, and the Certificate Of Service that was signed by Mrs. Smith was dated April 9, 1993. See Reply at Att.2. Mrs. Smith states in the Opposition:

On April 9, 1993, I filed an "Integration and Diversification Statement" with Judge Sippel and sent a copy to each applicant's attorney. The "Standard Document Production" was included in the envelope to each of the attorneys. It is very strange that Huber has not received these documents by April 16, 1993.

Any mystery is resolved by the date on the postage: April 13, 1993. And there is no record disclosed of the SIS ever being filed with the Secretary. The SIS and the documents were required to be exchanged (mailed) five business days after the NOAs were filed which would be April 12, 1993, at the latest. See Prehearing Conference Order, FCC 93M-114, released March 19, 1993. See also 47 C.F.R. §1.325(c). There is no dispute that Adams Rib has furnished opposing counsel with copies of the SIS, albeit late by one day.³ Also,

³ But on April 27, 1993, another applicant, Midamerica Electronics Service, Inc., filed a Motion To Strike the Adams Rib SIS because it is inconsistent with the Form 340 application for a noncommercial station which Adams Rib filed in this case. Adams Rib elected not to disclose any of the Form 301 integration disclosure and has not sought to amend its application within the time provided for amendments of right to provide such disclosure. Midamerica argues that the integration disclosed in the late-filed SIS is an unauthorized upgrade because of the failure to assert the intention to

documents produced by Adams Rib with the SIS failed to contain any documents relating to financing or the transmitter site. The issue germane to dismissal is whether the delicts of Adams Rib have substantially prejudiced the other parties and/or the progress of this case.

Discussion

5. Adams Rib has recently been deprived of communications counsel and has failed to meet the exactitudes of Commission procedures. It is recognized that a party that appears pro se assumes the burden of compliance with the Rules of Practice and with the procedural orders of the Presiding Judge. Silver Beehive Telephone Co., 34 F.C.C. 2d 738 (Comm'n 1972). However, the recent and apparently abrupt loss of the expertise of communications counsel at such a crucial stage of the case warrants consideration of mitigation. Cf. Nancy Naleszkiewicz, 7 F.C.C. Rcd 1797, 1800 (Comm'n 1992) (no discernable prejudice to public and no procedural disruption attributed to fact that an NOA was filed late where delay in filing did not necessitate a postponement of a scheduled procedural event). However, there has been shown some disruption, in prehearing discovery based upon the late filings and service of Adams Rib.⁴

6. Huber also argues for the dismissal of Adams Rib because of the alleged misrepresentations or lack of candor on the part of Mrs. Smith for her misstatements about the dates of filing events. The Commission generally does not authorize summary dismissal for alleged misrepresentation. See Nancy Naleszkiewicz, supra at 1800 (misrepresentation question returned to trial judge in remand). However, that case was not tried under the Commission's expedited rules for new FM stations. See Proposals To Reform Hearing Process To Expedite The Resolution Of Cases, 6 F.C.C. Rcd 157, et seq. (1990). This situation is similar to the case of LRB Broadcasting, 7 F.C.C. Rcd 6459 (Review Board 1992). That case also arose under the new procedures which contains a specific basis for a summary dismissal:

Where an applicant fails to file such a written [notice of] appearance within the time specified, ... or a petition to accept, for good cause shown, such written appearance beyond expiration of said 20 days, the application will be dismissed with prejudice. (Emphasis added.)

The Review Board noted, as is the case here, that the designation order specifically warns the applicants that if a party fails to file a timely notice of appearance without good cause the application could be dismissed for a failure to prosecute. There has been no effort on the part of Adams Rib to make a good cause showing for the delay in filing an NOA. In fact, the seeming prevarication of operative dates in her Opposition, the failure to

integrate at an earlier date in the application or by amendment. If Adams Rib remains in the case, a responsive pleading will need to be considered for a ruling.

⁴ Huber has stated some disruption or inconvenience in meeting the stepped discovery of documents to depositions under the new procedures. Specifically, Huber notes that the Adams Rib SIS was not received until the due date for supplemental document requests and deposition notices were due to be filed. Huber was rushed in making its supplemental request of Adams Rib. It is not clear that a deposition schedule was substantially delayed.

file her SIS, and the failure to comply with the standard document production, reflect the antithesis of any good cause.

7. The mere fact that the applicant was left without counsel is not a sufficient reason and, in any event, that circumstance has not been advanced as a reason. Cf. Lt. Colonel Cyrus v. Edwards, 7 F.C.C. Rcd 4558 (Review Bd 1992), holding that the Commission "would neither excuse nor tolerate disruptions of its process because an applicant, which undertakes to act as its own counsel, is unfamiliar with the Commission's rules and procedures." And there is not much room for discretion here, for as the Review Board held in LRB Broadcasting:

Here, the ALJ having found good cause wanting for the late filing, would have been fully justified in summarily dismissing the application on that basis, standing alone, as prescribed by 47 C.F.R. §1.221(c).

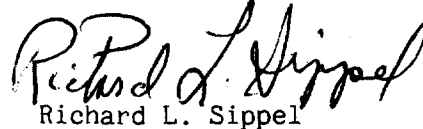
7 F.C.C. Rcd at 6460. To the extent that mitigating circumstances are considered they are outweighed by the lateness in exchanging an SIS and the absolute failure to file the SIS, the incompleteness of the documents that ultimately were exchanged late, and the necessity of consideration of an added issue for the apparent misrepresentations in the Opposition with respect to service and filing dates of pleadings. In addition to rebutting any inferences of good cause for lack of counsel, these circumstances also indicate a likelihood that Adams Rib will not comply in the future with deadlines for pleadings and discovery contained in future orders of the Presiding Judge. There also remains the unresolved problem with the failure of Adams Rib to include a docket number on its SIS, its failure to file the SIS with the Secretary and the uncertainty such practices cause the parties and the Presiding Judge in ascertaining the status of pleading cycles. In short, Adams Rib has been disruptive and gives a reasonable indication that it will remain disruptive to the resolution of this case in an expedited manner. Therefore, Adams Rib's application will be dismissed.

Rulings

ACCORDINGLY, IT IS ORDERED that the application of D.E.K.W. Communications, Inc. (File No. BPH-911115MF) IS DISMISSED with prejudice for a failure to prosecute and its name and file number ARE TO BE STRICKEN from the case caption.

IT IS FURTHER ORDERED that the application of Adams Rib, Inc. (File No. BPH-911115ME) IS DISMISSED with prejudice for a failure to prosecute and its name and file number ARE TO BE STRICKEN from the case caption.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge